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July 2, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: March 26, 2004

Case No.: TIA-0070

xxxxxxx (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits based on the employment of her late father, xxxxxxxxxxxx (the Worker). The Worker was a DOE contractor employee at a DOE facility for many years. The OWA referred the application to an independent physician panel, which determined that the Worker's illnesses were not related to his work at DOE. The OWA accepted the panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the panel's determination.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) covers workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act provides for two programs.

The Department of Labor (DOL) administers the first program, which provides \$150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides \$50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

1/ See www.dol.gov/esa.

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program.^{2/}

B. Factual Background

The Worker was employed at a DOE facility from 1951 to 1983. He was a maintenance mechanic/machinist and the Applicant has claimed that he was exposed to radiation while working at the DOE facility. On the Request for Review, the Applicant asked for a physician panel review concerning whether her father's "acute myeloblastic leukemia" and "renal failure" are related to his exposures at DOE. ^{3/} See Case No. TIA-0070 Record (Record) at 2.

The records indicate that pursuant to a routine annual physical in 1982, the Worker was found to have an abnormal white blood cell count and hematomas on his forearms. Record at 191. Subsequent medical testing led to the Worker being diagnosed with acute myeloblastic leukemia (AML). *Id.* The Worker received chemotherapy treatment for AML and was eventually placed on a disability pension by his employer at the DOE facility. Record at 38-66, 263-64.

In 1984-85, the Worker developed a large renal (kidney) cyst. Despite several attempts to drain the cyst, the cyst did not heal. Record at 30. Upon the Worker's worsening condition, he was admitted into a hospital where it was decided to remove the cyst, which necessitated a physician to conduct a radical nephrectomy (removal of the kidney). *Id.* After the surgery, the Worker experienced several bouts of internal bleeding, requiring two additional surgeries. Record at 30-31. The Worker subsequently developed hepatic and renal failure and subsequently passed away. Record at 31.

The physician panel reviewed the application and issued a report. See February 17, 2004 Physician Panel Report (Report). With regard to the AML, the panel noted that the Worker had documented exposure

^{2/} See www.eh.doe.gov/advocacy.

^{3/} The record refers to the Worker's leukemia using different, yet similar terms, such as acute myelogenous leukemia. For consistency, we will use the term acute myeloblastic leukemia, as specified in the panel report.

to radiation for the years 1954 to 1970 with total radiation doses of 1250 mrems deep and 1810 mrems shallow.^{4/} Report at 1. The panel also noted that there was one documented inhalation exposure indicated by nasal swab tests indicating an exposure of 508 d/m in the left nostril and 848 d/m in the right nostril. ^{5/} *Id.*; Record at 224. Because the National Institute of Occupational Safety and Health (NIOSH) had not yet completed a dose reconstruction to estimate the total exposure to radiation the Worker received, the panel itself estimated that he received a maximum total dose of radiation of 5 rem over his 30 year working career. The panel found that an exposure of 5 rem would be “a rather insignificant dose” and therefore was unlikely to have caused the Worker’s AML. The panel stated that AML becomes more common with age and the Worker was 60 years old when diagnosed with the illness. The panel also cited medical literature stating that there was controversy as to whether high radiation doses or occupational exposure to radiation caused an increased incidence of AML. *Id.* The panel concluded that the Worker’s AML was neither caused nor contributed to by his employment at the DOE facility. The panel, however, stated that a NIOSH dose reconstruction and a probability of causation analysis would “significantly clarify any possible connection between his [the Worker] employment and his AML.” *Id.*

In its report, the panel found that the Worker’s renal failure was not due to any exposure to toxic substances at the DOE facility. Citing the Worker’s death certificate, which listed the cause of death as “[m]ultiple organ system failure; acute tubular necrosis, hepatic failure, removal of right kidney for renal cyst and leukemia,” the panel found that the Worker’s death was not due to his AML but due to renal failure following the nephrectomy to remove the cyst. Report at 2. Furthermore, in the panel’s opinion, because the Worker’s AML was not caused by his occupational exposure at DOE, any role it played with regard to his renal shutdown would also not be caused by his exposure at DOE.

The OWA accepted the physician panel’s determination, and the OWA advised the Applicant that she had received a negative determination. *See* March 12, 2004 Letter from the Applicant to OHA. On March 26, 2004, the Applicant filed this appeal concerning the determination, generally asserting that the panel reached its conclusion by working “backwards basing their finding mostly on a death certificate instead of medical records.” April 6, 2004 Appeal Submission at 1. The Applicant has enumerated four specific grounds for her appeal:

- (1) The failure of the renal cyst to heal that prompted her father’s nephrectomy was caused by her father’s lowered immune system response due to his AML and the death certificate was completed by the urologist who performed the surgery and not by an oncologist;
- (2) Her father had told his family that he had been one of the employees selected to “clean up the site during an accident in the 1950s”;

^{4/} A rem is a measurement unit of absorbed radiation. A mrem is one-thousandth of a rem.

^{5/} The record does not indicate what unit of radiation measurement “d/m” refers.

- (3) The panel made its findings without the benefit of a NIOSH radiation dose reconstruction; and
- (4) The oncology physician group that treated the Worker believes that the physician panel made “a serious error in judgment” and that the group requests that the initial medical records be consulted and that the death certificate be viewed in light of the initial cause for going to surgery.

We consider these arguments below.

II. Analysis

In her Appeal, the Applicant challenges the panel’s consideration of her AML claim. She argues that the panel did not consider all of the Worker’s medical records and that the radiation exposure data is incomplete. In addition, she challenges the panel’s consideration of the Worker’s renal failure as a separate illness. She maintains that the renal failure was a consequence of the Worker’s AML, i.e., that the AML precluded the healing of the renal cyst, which precipitated a series of events leading to the renal failure. Accordingly, she views the panel’s consideration of the renal failure as a misunderstanding of her claim.

We have thoroughly reviewed the panel’s evaluation of the AML claim and do not find any panel error. The Physician Panel Rule requires that the panel explain the basis of its determination. 10 C.F.R. § 852.12. As described below, the panel explained the basis of its determination concerning the Worker’s AML, and the record supports that determination.

Contrary to the Applicant’s assertion, it appears that the panel did review all the medical records available to it in making its determination. *See* Report at 1; Record at 184. The panel specifically reviewed and cited the available radiation data in the records in coming to its decision. The Applicant’s statement, on appeal, that the Worker told family members that he had been involved with cleaning up the site (and by implication exposed to radiation) in the 1950s does not indicate panel error. Further, the panel addressed the risk factors for AML. The panel stated that an individual’s chance of suffering from AML goes up with age and that the Worker was over 60 years old at the time of his AML diagnosis. The panel also noted that the medical literature that it researched cast doubt on whether high radiation doses or occupational radiation exposure causes AML. Accordingly, the panel explained the basis of its determination and we see no basis for finding error in that explanation.

The fact that the panel did not have a NIOSH radiation dose reconstruction does not indicate panel error. The record indicates that the Applicant elected to proceed to panel review rather than await the completion of the NIOSH dose reconstruction. Record at 23 (10/27/30 entry). The panel makes a decision based upon record presented to it. In the present case, the panel used the available radiation dose information in the record as well as information as to the nature of AML to make its conclusion. As such it has

explained the basis for its determination and we can find no obvious error. It is apparent from the report that the panel would have liked to have reviewed a NIOSH dose reconstruction for the Worker. If the Applicant receives a NIOSH dose reconstruction pursuant to her DOL claim for benefits, she can request that the Office of Worker Advocacy provide another panel review based on this additional information.

III. Conclusion

In its review, the panel examined the available medical records and determined that the Worker's estimated radiation exposure would not have caused his AML. Further, the panel noted that it was questionable whether occupational exposure to radiation could cause AML. As the foregoing discussion indicates, the Applicant's appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (5) The Appeal filed in Worker Advocacy Case No. TIA-0070 is hereby denied.
- (6) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 2, 2004

